IN THE

Supreme Court of the United States

No. .....

BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, ET AL., *Petitioners,*

vs.

UNITED TRANSPORT SERVICE EMPLOYEES OF AMERICA, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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Statement of Petition

The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and George M. Harrison, hereby petition this court that a writ of *certiorari* issue to review a certain judgment of the United States Court of Appeals for the District of Columbia entered in this case on August 2, 1943, which said judgment affirmed a judgment of the United States District Court for the District of Columbia entered on July 6, 1942. (R. 78.) The suit in the District Court was captioned: "*United Transport Service Employees of America vs.*

National Mediation Board." No opinion was issued by the District Court. The opinion of the Court of Appeals for the District of Columbia is to be found at page 79 of the record.

The jurisdiction of this court is invoked under Section 240 of the Judicial Code as amended (U. S. C. Title 28, Section 347).

Statutory Provisions Involved

This case involves the interpretation of certain provisions of a statute of the United States known as the Railway Labor Act. In particular it presents a question regarding the nature of the collective bargaining rights of employees which are established under Section 2 Fourth of that Act, and the limitations imposed by the statute upon their exercise. The question of what is a "craft or class of employees" within the meaning of the statute, and, most important, the question of the scope of the discretion which may be exercised by the National Mediation Board under Section 2 Ninth in determining "craft or class" lines, and the extent to which its decisions are subject to being set aside by the courts on review.

The specific statutory provisions involved are as follows:

> "The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by

order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission," (Section 1 Fifth, U. S. C. Title 45, Section 151 Fifth.)

"Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization." (Section 2 Fourth, U. S. C. Title 45, Section 152 Fourth.)

"If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the

duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragarph." (Section 2 Ninth, U. S. C. Title 45, Section 152 Ninth.)

Statement of the Case

The St. Paul Union Depot Company, as its name implies, operates the union depot property in St. Paul, Minnesota. In connection with this operation, it employs a large number of clerical, office, station and storehouse employees. Of this force a comparatively small group, numbering 45 in all, are classed as "station porters." (R. 16, 35.) The duties of these porters are mixed in character. A portion

of their time is spent in custodial work performed in and about the carrier's station property in St. Paul and a portion is spent in so-called "red cap" work, *i.e.*, carrying hand baggage and generally assisting passengers through the station. The latter phase of their duties is predominant in point of time. (R. 27.) All of these employees are members of the Negro race.

The craft or class of clerical, office, station and storehouse employees of the St. Paul Union Depot Company is represented for the purposes of collective bargaining by the petitioner, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees. The representative status of the Brotherhood was not determined by an election among the employees but has been recognized since July 1, 1921, long prior to the enactment of the Railway Labor Act, and its authority has never been questioned during this period by the carrier or by the craft or class of employees represented by it. Since the date last mentioned, there has been in existence a collective bargaining contract between this carrier and the Brotherhood, covering the craft or class of clerical, office, station and storehouse employees. (R. 63.) The station porters were understood to be included within the scope of this agreement both by the Brotherhood and by the carrier. (R. 48, 65.) Their grievances were adjusted by Brotherhood officials (R, 55-56), their wages moved upward and downward with those of the other station employees (R. 40), and they were accorded seniority rights in accordance with the terms of the agreement. (R. 45.) Although thus entitled to the benefits of the existing agreement, the station porters were and are not eligible to full membership in the Brotherhood because of their race.

On February 3, 1939, the respondent labor organization, United Transport Service Employees of America, invoked the services of the National Mediation Board under

Section 2 Ninth of the Railway Labor Act for the purpose of securing an investigation of an alleged dispute as to the choice of the station porters in the matter of representatives. The United asserted to the Board that these employees constituted a separate craft or class within the meaning of the statute, and as such were entitled to choose a separate representative for themselves alone. The Brotherhood intervened and contended that the station porters were included within the more comprehensive craft or class of clerical, office, station and storehouse employees, that there was no representation dispute as to this craft or class as a whole, and that the application of the United should accordingly be dismissed.

After a full hearing at which both organizations were represented, the National Mediation Board issued its decision, holding that the station porters were not a craft or class of employees and dismissed the application. A portion of the transcript of the Board's proceedings is to be found at pages 35-74 of the record and its decision at pages 14-27.

Thereafter, United filed suit in the District Court for the District of Columbia asking a mandatory injunction requiring the National Mediation Board to recognize the station porters as constituting a separate craft or class of employees and to make an investigation of their choice of representatives. The National Mediation Board answered and the petitioner here intervened as a party defendant in the District Court. No additional evidence was taken by the court, the case being heard on the record made before the National Mediation Board. After hearing, the District Court entered judgment in favor of the plaintiff United Transport Service Employees. The findings and order of the District Court are set forth in the record on pages 75-78.

After the District Court had announced its decision, but before any formal order had been prepared, the court requested counsel to submit proposed findings of fact and conclusions of law. Such a submission was made by the plaintiff's attorneys, and the Department of Justice, acting as representative of the National Mediation Board, presented objections. These objections were delivered to the Judge and not filed with the Clerk of the court, and hence do not form a part of the record in this case. We consider them significant here because they constitute the only official statement of the position of the Department of Justice with regard to the propriety of the judgment below, a matter in which this court will doubtless be interested because of the Department's failure to participate in the subsequent proceedings. The following is quoted from the objections in question:

> "Plaintiffs propose a finding of fact (No. 1) that the employees involved in the dispute under consideration constitute a separate craft or class for bargaining purposes; a finding of fact (No. 2) that the employees have not designated the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees as their bargaining agent, and that the said Brotherhood is not as a matter of fact their bargaining agent; and a finding of fact (No. 3) that the preponderance of service rendered by the employees was as 'red caps' and that this fact entitles such employees to be so designated. Whether in a given case certain employees are members of one craft or another, whether they have been represented by a particular union, and whether the craft lines are to be determined by the proportion of time spent in a given service or by other varying factors, are all questions of fact and administrative judgment. On the evidence before it the Board has resolved each of these questions. If its judgment is arbitrary and capricious because not supported by substantial evidence, this court has the power so to find and to set the Board's order aside.

It is not the court's province, however, to weigh the evidence and make independently the administrative decision which, in its judgment, the Board should have reached.

"2. Plaintiffs propose a finding that the employees involved in this case did not and could not belong to the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (Finding No. 2). The proposed conclusions of law do not state that this fact affects or controls the decision, but such is the implication. We submit that if any finding is made on this subject the court should indicate in what manner the finding is relevant to the decision. The United States Court of Appeals for the District of Columbia has specifically repudiated the proposition upon which the proposed finding is apparently based. *National Federation of Railway Workers vs. National Mediation Board,* 110 F. (2d) 529, 537-538, certiorari denied 310 U. S. 628. In that case the plaintiff Federation made the same contention as is presented here, and although the Government in its argument, and this court in its opinion both took the position that the race question was not an essential factor, the Court of Appeals passed upon it in general terms which would seem to be applicable here, and the Supreme Court denied certiorari. The Court of Appeals said (p. 538):

'In the last analysis, the Federation's contention reduces itself to the proposition that the members of every race in a craft of workmen have a constitutional right to representation by one of their own race, which neither the majority of the craft nor their own race may take from them. Acceptance of such a principle would certainly destroy the bargaining advantage of the united front secured to employees by the provision of the Act that a majority of any craft shall select the representative for the craft. The Federation really objects to the principle of majority rule as applied to the selection of the bargaining agency or representative. It is clear beyond doubt that constitutional objection to majority rule in the selection of an employee bargaining agency cannot prevail. *Virginian Ry. Co. vs. Sys-*

tem Federation, 300 U. S. 515, 516, 548, 57 S. Ct. 592, 81 L. Ed. 789; *National Labor Relations Board vs. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 44, 57 S. Ct. 615, 81 L. Ed. 893, 108 A. L. R. 1352. *Cf. Grovey vs. Townsend, supra.*' "

The plaintiff's suggested findings and conclusions were accepted in spite of the Government's objections, and judgment was entered in the District Court in favor of the plaintiff. Although the Department of Justice, in the document above quoted, expressed itself as considering the judgment erroneous, it declined to join in an appeal, has not participated further in the case, and has made no additional statement as to its position on the law. This fact is the more remarkable because, in another case now pending before this court, we are advised that the Government has taken the position that the National Mediation Board is not subject to suit without governmental consent, and that in the absence of such consent, the courts are without jurisdiction to entertain a suit against it. See the Government's brief in the case of *Switchmen's Union of North America vs. National Mediation Board*, Case No. 48 in the Supreme Court of the United States. It should be borne in mind that the present action originally named the National Mediation Board as sole party defendant, and that the petitioners herein entered the suit by intervention. Nevertheless, the issue of the liability of the Mediation Board to suit was not raised by the Government.

After the entrance of judgment by the District Court for the District of Columbia, an appeal was taken by the present petitioners to the Court of Appeals for the District of Columbia, which court, however, affirmed the judgment of the District Court. This petition for a writ of *certiorari* is filed for the purpose of securing a review of that decision.

Issues Presented and Position of Petitioners

As we understand the opinion of the Court of Appeals for the District of Columbia, it is based primarily on an asserted principle of law that ineligibility to membership in a labor organization fixes the limits of a craft or class of employees within the meaning of the Railway Labor Act. Under this decision, the National Mediation Board appears to be barred from exercising any discretion in such cases, and is required as a matter of law to recognize ineligible employees as constituting a separate craft or class because of their ineligibility. In addition to the general principle above stated, the Court of Appeals in its opinion calls attention to certain specific facts in the case at bar, which, it asserts, lends peculiar support to its position, but which are in fact wholly irrelevant as will be noted below.

The petitioners contend that the decision of the Court of Appeals is erroneous and should be reviewed and reversed by this Court, because

I. The interpretation given to the Railway Labor Act as requiring that employees ineligible to membership in a labor organization cannot be included in a "craft or class of employees" represented by that organization, is erroneous, as shown by:

A. The language of the statute and the course of its historical development.

B. Administrative interpretations of similar statutes.

II. The decision of the Court of Appeals is based in part on special features of this case which are, in fact, neither determinative nor relevant.

III. The effect of the decision of the Court of Appeals is to deprive the National Mediation Board of essential authority to decide issues which are primarily administrative in character.

Argument

I. INTERPRETATION GIVEN TO THE RAILWAY LABOR ACT AS REQUIRING THAT EMPLOYEES INELIGIBLE TO MEMBERSHIP IN A LABOR ORGANIZATION CANNOT BE INCLUDED IN A "CRAFT OR CLASS OF EMPLOYEES" REPRESENTED BY THAT ORGANIZATION IS ERRONEOUS.

A. The Language of the Statute and the Course of its Historical Development.

The Court of Appeals predicates its decision primarily upon the provision of Section 2 Fourth of the Railway Labor Act, which is to the effect that "employees shall have the right to organize and bargain collectively through representatives of their own choosing." The court fails, however, to give consideration to the fact that the right so granted is limited as to the mode of its exercise. While every individual employee has the right to participate in collective bargaining, it is obvious that if he wishes to enjoy that right, he must do so in cooperation with others. Collective bargaining is necessarily a group enterprise. The Railway Labor Act does not confer the right to bargain collectively on every group which desires to do so. The nature of those groups who are permitted to enjoy this right is particularly expressed in the statutory provision that "the majority of any *craft or class of employees* shall have the right to determine who shall be the representative of the *craft or class* for the purposes of this Act."

To say, as the lower court says, that a group of employees must be considered as a craft or class in order to guarantee it the right of collective bargaining conferred by the statute, is therefore a question-begging approach to the case. Such a group must first establish that it is in

fact a craft or class before it is shown to be entitled to participate in collective bargaining. It is the position of petitioners that the status of any group of employees as a craft or class is not to be determined by the fact that a failure to so classify it will deny it the right to bargain collectively as a group. Many types of employee groups are denied that right by the statute. The question of "craft or class" status must rather be determined objectively and the answer will depend upon the innate characteristics of the group in question. This contention is sustained by the language of the Railway Labor Act and its historical background.

The Statutory Language. The statute itself contains no definition of the words "craft or class." The phrase carries with it, however, the connotation of a group of employees performing generally similar services and having common interests in their employment. It is a phrase of restricted meaning. This fact can best be shown by contrast.

The counterpart of the Railway Labor Act is the National Labor Relations Act, which operates in the industrial field. The latter statute provides for collective bargaining units of employees but in very different language from that used in the Railway Labor Act. Section 9(b) of this statute reads as follows:

> "The (National Labor Relations) Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." (U. S. C. Title 29, Section 159(b).) (Portion in parentheses not a part of quotation.)

Three facts are apparent from this language. In the first place, a wide variety of collective bargaining units is contemplated. Plant units and employer units, as well as the more restricted craft units, and subdivisions of each of these, are recognized. Secondly, the National Labor Relations Board is given the authority to fix upon the type of unit to be used. Thirdly, the discretion of that Board is to be governed exclusively by the prospective consideration of how well various units may be expected to operate in the practical functioning of collective bargaining.

The Railway Labor Act is predicated upon a very different theory. No variety of units is contemplated. The "craft or class"* is the only one recognized. The National Mediation Board has no power to fix the type of unit to be used, in any given case. It may merely determine (under Section 2 Ninth) whether an asserted craft or class is such in fact, and what employees are members of it, entitled to participate in a representation election. Thus, the National Mediation Board cannot recognize an employer unit or plant unit of employees or a subdivision of a craft or class unit, however successful it may consider that such a unit would be in collective bargaining. On the other hand, it may not refuse to recognize any craft or class unit, however much it may feel that there exist within it elements of dissension which will render collective bargaining difficult or even impossible.

From the language of the Railway Labor Act, there-

*No particular significance is to be attached to the fact that the statute uses the alternative expression of craft *or* class. Certain groups of railroad employees have been for many years considered as crafts in the strict sense of the word. Craftsmen are skilled mechanics and any individual desiring to attain the status of craftsman must pass through a rigid apprenticeship. Shop employees of the railroads are habitually referred to as the "shop crafts." Other groups of railroad employees do not maintain this craft system, and are accordingly referred to as classes. The phrase "craft or class" therefore does not refer to two types of employee groups, but merely to the two names by which those groups are commonly known in the industry. We know of no decision, administrative or judicial, which seeks to make any real distinction between them.

fore it appears that the phrase "craft or class" is one of definitely restricted significance. A specific type of collective bargaining unit is meant. This fact becomes more apparent as well as more significant, when we consider the historical background of the statutory phrase. Such a study will reveal the nature of the unit to which Congress referred.

Historical Development of the "Craft or Class" Concept in Railroad Labor Legislation.

The language of Section 2 Fourth of the Railway Labor Act, relating to crafts or classes of employees was drawn from one of a group of principles laid down by the United States Railroad Labor Board in Appendix B of its Decision No. 119, *International Association of Machinists, et al., vs. Atchison, Topeka & Santa Fe Railway Company, et al.*, 2 U. S. R. L. B. 87. The principle, as stated by the Board, reads as follows:

> "The majority of any craft or class of employees shall have the right to determine what organization shall represent members of such craft or class. Such organization shall have the right to make an agreement which shall apply to all employees in such craft or class. No such agreement shall infringe, however, upon the right of employees not members of the organization representing the majority to present grievances either in person or by representatives of their own choice."* (page 96.)

Decision No. 119 of the Railroad Labor Board was issued under the following circumstances. During the period of Federal control of railroads, the United States Director General executed a series of so-called "National Agreements" with the standard labor organizations of rail-

*This Court recognized the above quoted provision as the source of the language of Section 2 Fourth in the course of its opinion in the case of *Virginian Railway Company vs. System Federation No. 40*, 300 U. S. 515, at page 561.

road employees, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees among others. With the termination of Federal control, these agreements were kept in effect temporarily by order of the Railroad Labor Board. The organizations proposed that they be retained in effect permanently. This the carriers declined to do. The dispute growing out of this request and refusal was referred to the Board and resulted in the issuance of Decision No. 119. This decision continued the rules of the National Agreements in effect until July 1, 1921, when they were to be abrogated and presumably replaced by individual agreements executed on the properties of the various carriers. Exhibit B constituted a statement of principles which the Board considered should control negotiations between the parties.

In dealing with railroad labor problems, the U. S. Railroad Labor Board was confronted with the fact that employees were already divided into recognized classes for the purpose of collective bargaining. As the Board stated in the course of its opinion in the above cited case:

> "During Federal control the Director General of Railroads entered into contracts with *organizations of employees of these carriers.* These contracts, called national agreements, set out *the classes of employees affected,* define with particularity the grades *in each class,* specify work to be done by each grade, hours of service, when payments shall be made, how forces shall be reduced, seniority determined, work assigned, grievances adjusted, apprentices trained, and otherwise fix the rights and obligations of the parties as to working conditions." (Emphasis supplied) (pp. 87-88.)

Thus, when the Board held that the majority of each craft or class of employees was entitled to select its own collective bargaining representative, it was not attempting to establish a new system or new collective bargaining

units. It merely recognized units which were already established and functioning.

Naturally enough, controversies arose after the issuance of Decision No. 119, as to what constituted a craft or class of employees. In the case of *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees vs. Pennsylvania System*, 2 U. S. R. L. B. 216, the Board was called upon to consider this question, and said:

> "The Labor Board has heretofore held that employees performing work similar in its general characteristics and in the conditions surrounding it belong to the same class, within the meaning of the statute. It now holds the converse of this proposition—namely, that employees performing work dissimilar in its general characteristics and in the conditions surrounding it must be assigned to different classes, within the meaning of the statute." (p. 221.)

In still other cases, questions arose as to the connection between union membership and membership in a craft or class. In the case of *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees vs. Maine Central Railroad Company*, 4 U. S. R. L. B. 700, the Board held that:

> "* * * employees of a class or craft come under the provisions of the agreements negotiated by the organization representing a majority of such class or craft, irrespective of membership or nonmembership in the organization holding the agreement for the particular class or craft." (p. 702.)

To the same effect, see *Brotherhood of Railroad Station Employees vs. Portland Terminal Company*, 5 U. S. R. L. B. 381.

Summarizing these decisions of the Railroad Labor Board, three facts are apparent. In the first place, the Board's selection of the craft or class of employees as the

bargaining unit was made on the basis of retrospective considerations. Such units already existed. The Board did not create them. It merely sanctioned their continuance. Secondly, the Board conceived of the craft or class of employees as a group having common characteristics as to the nature of their employment, a purely objective factor. Finally, the Board considered the craft or class as something totally distinct from the labor organization which might be chosen to act as its representative. All members of the craft or class might vote for a representative, irrespective of union membership and the chosen representative was obligated to represent members and non-members alike.

When Congress adopted the Board's phraseology and enacted it into statutory law, it must be presumed to have adopted as well the meaning which the Board attached to it. In fact, when Mr. Joseph B. Eastman* appeared before the Committee on Interstate and Foreign Commerce of the House of Representatives to sponsor the Act, he was asked as to the meaning to be attached to the phrase "craft or class of employees." His answer was as follows:

> "We thought of that, as to whether or not it was necessary to define craft or class, but those are words which have been used in labor parlance for a very long time, and I think there would be no difficulty in determining what is a craft or class of employees." ("Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 73d Congress, 2d Session, H. R. 7650," page 45.)

To summarize this whole phase of the discussion based on the language and history of the statute, it appears that by the designation of the craft or class as the collective

*Mr. Eastman was then Federal Coordinator of Transportation. He and his staff had given considerable study to the railroad labor situation and had participated in the drafting of the bill which later became the Railway Labor Act.

bargaining unit for railroad employees, Congress intended:

(1) To restrict the type of collective bargaining units into which these employees might be subdivided;

(2) To provide for so-called "horizontal" units distinguished from one another by objective factors such as the characteristics of the work performed;

(3) To recognize units already established and existing throughout the industry for many years;

(4) To provide that membership or non-membership in a labor organization should not govern either in regard to the right of employees to express their choice of a representative or in regard to the representative's right or duty to speak for all employees after it had been properly selected;

(5) To restrict the power of the National Mediation Board to that of determining lines of demarcation between crafts or classes rather than to permit it to establish collective bargaining units which would, in its judgment, be most successful for that purpose.

The significance of these conclusions in relation to the issues of the present case lies in the fact that the limits of crafts or classes of employees depend largely on retrospective and objective considerations drawn from collective bargaining history in the industry rather than upon prospective considerations involving the probability of satisfactory collective bargaining in the future. We believe that a technically sound argument could be made to the effect that the National Mediation Board is entirely limited to these retrospective and objective factors when called upon to differentiate between crafts or classes of employees. We doubt, however, whether such an extreme position could be or need be maintained. Certainly it would not accord with the practice of the Board, which has from time to time given consideration in representation cases to the probable effects of its decisions as measured in terms of the suc-

cessful functioning of the Railway Labor Act for the purposes intended.* It cannot be denied, however, that the Board's consideration of such factors is definitely circumscribed by the language of the statute. We repeat that the Board has no power to recognize any collective bargaining unit, however much it may appear to offer in the way of successful collective bargaining, unless that unit can bring itself within the historical definition of the craft or class of employees. For the most part, this definition depends upon retrospective and occupational factors. The field left for a play of administrative discretion in the matter of prospective factors is therefore strictly limited.

The question of eligibility or ineligibility to membership in a labor organization is a purely prospective element which relates to collective bargaining within the craft or class. While we believe that the National Mediation Board may give such an element consideration, it may not do so to the exclusion of the historical factors which lie at the very source of the craft or class concept. *Yet this is exactly what the Court of Appeals has ordered the Board to do in this case.* This, we submit, is erroneous. Ineligibility to membership in a labor organization should be considered at most as being but one factor among many which may determine craft or class lines. It should be weighed in connection with other factors of employment characteristics and collective bargaining practice on the property, and the Board should be permitted to reach a decision in light of all of the elements of the problem and the facts of the specific case.

The Court of Appeals, however, would elevate the ineligibility factor to a position of supreme importance. It would be established as a rule of law that, wherever in-

*See "The Railway Labor Act and the National Mediation Board," a pamphlet published by the National Mediation Board in August, 1940, pages 15-17, inc.

eligibility is found to exist, the Board must recognize a new craft or class of employees made up of the ineligible workers. Such a holding runs directly counter to the language of the Railway Labor Act and its historical background.

B. Administrative Interpretations of Similar Statutes.

Insofar as we are aware, the only tribunal, administrative or judicial, (other than the National Mediation Board and the lower courts which passed upon this case), which has had occasion to pass on the question of ineligibility in relation to collective bargaining units of employees, is the National Labor Relations Board. Its decisions on this point are therefore significant.

As noted above, the National Labor Relations Act provides that "the board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or sub-division thereof." (U. S. C. Title 29, Section 159 (b).)

With all of its broad powers to mold bargaining units according to the needs of individual situations, it has always considered the item of eligibility or ineligibility to membership in a labor organization as only *one factor among many* in determining collective bargaining units, and their scope. In its Second Annual Report, page 129, the Board stated:

> "The rules of eligibility to membership in the unions which the employees form or join constitute one of the clearest manifestations of the manner in which they desire collective bargaining to take place. If such organizations are formed of the employees'

free will, the qualifications for membership therein reflect the judgment of the employees as to the proper unit for collective bargaining."

* * * * *

"However, it is clear that the Board cannot be bound in determining the appropriate unit by the rules established by the labor organizations in the field. Those rules constitute only one of the factors which the Board considers in making its decision. Not even the fact that some of the employees involved are ineligible to membership in one or more of the competing unions is necessarily a bar to their inclusion in the unit found appropriate by the Board."

To the same effect, see the statements made by the Board in its Third Annual Report, pages 166-167.

In a number of cases, the Board has applied this principle by establishing collective bargaining units whose limits are in accord with the eligibility provisions of organization constitutions. In other cases, however, it has considered the factor but has also considered that other factors outweighed it in importance. Thus, in the case of *In the Matter of Sloss Sheffield Steel and Iron Company*, 14 N. L. R. B. 186, 192, the Board held that an appropriate unit could include Negro employees ineligible to membership in the organization where the organization agreed to bargain for such employees if selected as the representative. This same proposition appears to be supported by the case of *In the Matter of Floyd A. Fridell*, 11 N. L. R. B. 249, which is cited by the Board in support of its decision in the *Sloss Sheffield* case.

The principle established by the *Sloss Sheffield* case was reiterated by the Board in its opinion in the case of *In the Matter of American Granite Finishing Company*, 27 N. L. R. B. 1016.

The case of *In the Matter of California Walnut Growers Association*, 18 N. L. R. B. 493, involved the situ-

ation of 65 male employees who were ineligible to membership in an organization known as the Walnut Workers' Union. These employees were included in the collective bargaining unit which the union would presumably represent, against the protest of the union itself.

To our knowledge, none of these decisions has ever been challenged in court, nor has it ever been asserted from any authoritative source that the National Labor Relations Board could not as a matter of law include within a proposed collective bargaining unit employees who are ineligible to membership in a labor organization which will presumably act as their collective bargaining representative. Surely if such an alleged principle of law has any place anywhere in the field of labor relations, it should be applicable to the National Labor Relations Board, whose choice of collective bargaining units is virtually unlimited and which is specifically directed to choose the one most conducive to full employee representation. Yet the National Labor Relations Board has not recognized the existence of such a rule, but has reserved to itself the discretionary power to weigh ineligibility in connection with other elements and to deside its cases accordingly. This is the same discretion whose existence we assert with reference to the National Mediation Board, but which is denied by the opinion of the Court of Appeals.

II. THE DECISION OF THE COURT OF APPEALS IS BASED IN PART ON SPECIAL FEATURES OF THIS CASE WHICH ARE, IN FACT, NEITHER DETERMINATIVE NOR RELEVANT

In its opinion, the Court of Appeals refers to certain facts of the present case as affording a peculiar justification for the decision reached. It is stated at several points

that the *employer* had designated the Brotherhood as the representative of the employees in question and that they themselves had never had the opportunity to participate in a representation election. As typical, we quote the following from the opinion of the court:

> "But the employees in the case at bar have had their representative designated for them by their employer without even the opportunity to exercise the right of being in the minority or to fail to vote if they should so choose."

This statement, while not wholly incorrect, is one of those half-truths which so easily lead to misunderstandings. In this case, it seriously misled the Court of Appeals. The facts in this connection are as follows: In 1921, after the termination of federal control of the railroads, and shortly after Decision No. 119 of the U. S. Railroad Labor Board was issued, the St. Paul Union Depot Company recognized the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees as the representative of the craft or class of clerical, office, station and storehouse employees on its property, and executed an agreement with it covering the wages, hours and working conditions of such employees. (R. 62-63.) There was nothing illegal or reprehensible in this procedure. At that time, when disputes existed as to the choice of representatives by a craft or class of employees, the U. S. Railroad Labor Board could and did conduct representation elections and order the carrier to recognize the successful contestant. Orders of the Board, however, were not enforceable by legal process, and the effective status of the selected representative depended ultimately on the recognition of it by the carrier. In the present case, the carrier extended that recognition to the Brotherhood voluntarily without an election, in the apparent belief that it represented a majority choice. There is no record of any pro-

test by any party nor of any petition for an election among the craft or class of clerical, office, station and storehouse employees, so that the carrier's decision appears to have been fully justified.

This condition has continued unchanged to the present day, although the contract itself has been modified in some particulars. There has been full opportunity for a challenge of the Brotherhood's status as the representative of the clerical, office, station and storehouse employees from 1920 to 1926 (by an election conducted by the U. S. Railroad Labor Board) and from 1934 to the present time (by an election conducted by the National Mediation Board under Section 2 Ninth of the Railway Labor Act). There has been no such challenge. Accordingly, the statement of the Court of Appeals to the effect that the Brotherhood was "designated" by the St. Paul Union Depot Company as the representative of employees is incorrect. The craft or class of clerical, office, station and storehouse employees designated their own representative. The company merely recognized the will of the majority, and the correctness of its decision is shown by over 20 years of uniformly harmonious relations. Surely no carrier is obligated by the Railway Labor Act or any other statute to question the status of any asserted representative when there is no dispute as to its authority.

The court states further that the station porters have never had the opportunity to participate in a representation election. This statement is correct. No members of the station forces of this company have had such an opportunity. There has never been a representation election in which any of them could participate. There has never been a representation dispute necessitating the holding of an election. The Court of Appeals, however, relies heavily on the absence of any election in support of its decision. It recites this fact as distinguishing the present case from its

own decision in the case of *National Federation of Railway Workers vs. National Mediation Board*, 71 App. D. C. 256, 110 F. 2d 529, where the court upheld a certification of the National Mediation Board designating as the representative of a craft or class of employees an organization which did not admit certain members of the craft or class as members of the organization. We fail utterly to see any logical foundation for such a distinction. The basic substantive provision of the Railway Labor Act is that contained in Section 2 Fourth to the effect that a majority of a craft or class shall have the right to select a representative to act for the craft or class. Section 2 Ninth of the statute, in providing for a representation election, merely implements the provision in Section 2 Fourth, and provides the means whereby the will of the majority may be ascertained in case of a dispute. There is, therefore, no particular virtue in a representation election such as to affect the substantive rights of individuals. The decision of the Court of Appeals on this point, if reduced to its ultimate principles, means that the existence of a representation dispute and the holding of a representation election may operate to include within a craft or class certain employees who would not be included in the absence of a dispute and election. This is a wholly untenable position. It ignores the fact that the craft or class is a stable unit whose limits are determinable by objective standards, standards which are as applicable and as fully operative in cases where no representation dispute exists as they are in cases where there is such a dispute.

All in all, it appears to us that the decision of the Court of Appeals was based on an assumption of the very point at issue in the case. It assumed that the station porters constitute a separate craft or class. Having made this assumption, it was not difficult to reach the conclusion that they had been deprived of their right to select a sep-

arate representative, and to bargain collectively as a group. On this assumption, too, the act of the carrier in refusing to recognize the United as the representative of the station porters became wrongful. Having recited these alleged wrongs, the court then decided that in order to eliminate them, it was necessary to order the National Mediation Board to recognize the station porters as a separate craft or class. The court failed to realize that the wrongs which it recited are wrongs only if the station porters do in fact constitute a craft or class of employees. The court gave little or no consideration to the historical objective facts upon which a determination of craft or class lines must be based.

Hence, it appears that the special facts which the Court of Appeals emphasized in its opinion are not significant in relation to the real issue in the case. The court, by stressing these points, begged the question which was before it and reached an erroneous decision.

III. THE EFFECT OF THE DECISION OF THE COURT OF APPEALS IS TO DEPRIVE THE NATIONAL MEDIATION BOARD OF ESSENTIAL AUTHORITY TO DECIDE ISSUES WHICH ARE PRIMARILY ADMINISTRATIVE IN CHARACTER

The National Mediation Board was established in 1934. It is the oldest of all federal agencies operating in the field of labor relations. Its career has been notably lacking in those bitter controversies over procedure, personnel and principles of decision which have characterized the history of many contemporaneous agencies. While its primary function is mediatory, it has, as we have seen, a positive jurisdiction under Section 2 Ninth of the Railway Labor Act to *decide* certain controverted issues arising out of representation disputes. This jurisdiction it has exercised for

over nine years. During the first eight of those years, it considered 903 representation controversies, and its decisions were received with a minimum of protest and litigation.*

During the period of the operation of the Railway Labor Act and of the Board, its principal administrative agency, strikes and labor disturbances of serious proportions have been practically unknown in the railroad industry.** The record of the Board compels the conclusion that it has shown itself to be a truly expert tribunal. It has been able to attune its operations to the needs of employers and employees in the railroad industry.

The present case was handled by the Board in accordance with its usual procedure and methods. A full hearing was had and a record was taken. Thereafter the Board issued a lengthy and comprehensive opinion wherein it analyzed the contentions of the parties and announced its conclusion. (R. 14-27.) In this opinion, it stated the problem before it thus:

> "In questions of craft or class determination the Board gives consideration to many factors, most important of which are the intent and purpose of the Railway Labor Act in the matter of labor representation and the maintenance of sound labor relations on the railroads. Each individual case, of course, requires consideration of many facts peculiar to the particular situation, but, in addition, there are general factors to be considered. These include the composition and relative permanency of the employee groupings along craft or class lines for representa-

*For a general discussion of the functions and procedure of the Board in representation cases, see "Administrative Procedure in Government Agencies, Monograph of Attorney General's Committee on Administrative Procedure," Part 4, page 22. For a discussion of the relatively small number of instances in which Board decisions have been challenged in court, see "The Railway Labor Act and the National Mediation Board," page 37. For the number of representation controversies handled, see the "Eighth Annual Report of the National Mediation Board," page 22.

**"The Railway Labor Act and the National Mediation Board," page 28; "Seventh Annual Report of the National Mediation Board," page 9; "Eighth Annual Report of the National Mediation Board," page 8.

tion purposes not only on the particular carrier but on the railroads generally. The extent and effectiveness of past collective bargaining arrangements on the part of the employees regarding seniority, promotion and demotion are other factors which must be considered, as are the duties and responsibilities of the employees and the nature of their work. Previous decisions of the Board which bear upon the issues involved in a particular controversy are also taken into account. All of these factors have received the consideration of the Board in coming to a conclusion respecting the issues involved in this case." (R. 22-23.)

Without attempting to discuss all phases of its opinion at length, it will be sufficient to note that the Board found that "for many years the employees here concerned have been part of the craft or class of clerical, office, station and storehouse employees in the service of the company." (R. 23.)

It held that the fact that "station porters are carried on seniority rosters, that their positions are bulletined and assigned to the applicant with the greatest seniority, that they have 'bumping' rights—all of these circumstances demonstrate that station porters have acquired benefits in the form of seniority rights as members of the craft or class of clerical, office, station and storehouse employees through representation on the property by the Brotherhood." (R. 25.)

It called attention to the fact that in numerous prior cases, it had been called upon to fix a line of demarcation between the craft or class of clerical, office, station and storehouse employees on the one hand, and the craft or class of red caps on the other, and that in such cases, it had determined that the line should be drawn so as to include in the former group all those who devoted all or a portion of their time to custodial duties and in the latter group, those employees who performed no custodial work. These

decisions were entered without any serious disagreement on the part of either of the two organizations now before this court. The Board summarized its past findings in this regard in the following language:

> "Furthermore, irrespective of what organization has been designated as representing so-called 'redcaps'—employees performing only personal service for passengers—such organizations and the carriers concerned have invariably negotiated separate agreements establishing the labor standards of their employees. On the other hand, where employees who, incident to their personal service for passengers, also perform custodial duties for carriers, are covered by agreements, such agreements cover the entire craft or class of clerical, office, station and storehouse employees." (R. 22.)

Finally, considering the specific feature of ineligibility, the Board said:

> "The employees here involved are colored and because of this they are not eligible for membership in the Brotherhood. It has been implied that by this fact it is recognized that these employees are a separate craft or class. With this position the Board cannot agree because there is no relationship in the Railway Labor Act between representation and membership or non-membership in a labor organization. Once a craft or class has designated its representative, such representative is responsible under the law to act for all employees within the craft or class, those who are not members of the representatives' organization as well as those who are members." (R. 26-27.)

It is submitted that the opinion of the National Mediation Board reveals a clear appreciation of the problem before it and a thoughtful effort to solve that problem through a consideration of all relevant factors. The opinion bears throughout the hallmark of careful administrative judgment, informed and expert in the field wherein it operates.

We are now faced with a judicial decision setting aside the conclusion of the Board on the ground that the factor of ineligibility does not present a question of fact but a question of law, and holding that where ineligibility is found to exist a separate craft or class must be created to embrace the ineligible employees. This decision is rendered by a tribunal which, while according it due respect, cannot claim to be peculiarly expert in the field of railroad labor relations. It purports to exclude the National Mediation Board, a specialized and expert tribunal, from the exercise of discretion which is essential to the fulfillment of its statutory purpose.

Let us consider this question of ineligibility to membership in labor organizations in its various ramifications. Ineligibility may be due to race, or sex, or age. Some labor organizations exclude the adherents of various political groups whose beliefs are considered to be opposed to the American form of government. Some require a salute to the American flag, which the adherents of certain religious cults are unwilling to give. Some will not admit to membership any workers who have been employed as strike-breakers. Some refuse to re-admit those who have been members but who have been expelled for cause. There are dozens of different sorts of membership requirements, each one of which may result in the exclusion of groups of employees. Is each of these groups to be considered as a separate craft or class entitled to select representatives under the Railway Labor Act? Are we to have, perhaps, a situation where two employees working side by side and performing the same work are nevertheless members of different crafts or classes merely because one is eligible to membership in a certain labor organization and the other is not? Will a change in the eligibility rules of a labor organization which is acting as a collective bargaining representative have the effect of changing the limits of the

craft or class which it represents? If that labor organization loses the support of a majority and is supplanted by another having different eligibility rules, will craft or class lines be altered thereby?

We ask these questions not because we believe that their answer is to be found in the decision of the Court of Appeals and not because we expect them to be answered by this court. We present them merely to show the complicated nature of the problem, its close relationship to the process of collective bargaining, and its connection with the functioning of the Railway Labor Act. The problem in essence is not a judicial problem but an administrative one. It is obvious that this whole question of eligibility to membership in labor organizations is a delicate question which calls for the utmost of expert knowledge and sound discretion. No single inflexible answer will serve for all cases and all situations. As we understand the decision of the Court of Appeals, it attempts to state such an inflexible answer in the form of a positive rule of law. This is an improper approach which will exclude the discretionary power of the National Mediation Board at the very point and with regard to the very question where the exercise of that power is most needed. We cannot but believe that such a course will seriously impair the effectiveness of the Board and of the Act which it is required to administer.

Conclusion

In the above discussion, we have pointed out that the decision of the Court of Appeals for the District of Columbia should be reviewed and reversed by this court, because,

First, it erroneously holds that employees who are ineligible to membership in a labor organization cannot as a matter of law be included in the craft or class of employees

which is represented by that organization. This conclusion runs counter to the language of the Railway Labor Act and to the historical background of the phrase "craft or class of employees." The crafts and classes of railroad workers are collective bargaining units whose existence antedates that of the statute itself. To a considerable extent their limits are inflexible and must be determined on an objective and retrospective basis. Eligibility to membership is a prospective factor. At most, it can be but one element in any dispute regarding the limitations of a craft or class. It is not controlling, but must be weighed by the National Mediation Board in relation to other elements, all in the exercise of the Board's sound discretion. This is the conclusion reached by the National Labor Relations Board whose authority in relation to collective bargaining units is broader and is directed more to prospective considerations of future collective bargaining than is that of the National Mediation Board.

Second, the decision of the Court of Appeals is based in part on certain factors peculiar to this case whose significance was wholly misconstrued by the court. Recognition of a union by an employer when the desire of a majority of employees is unquestioned, does not constitute a "designation" of a collective bargaining representative by the employer. The fact that a representation election has not been held, does not operate to change the limits of a craft or class of employees. The decision below rests in part on the converse of these two propositions, and is therefore erroneous.

Third, if allowed to stand, the decision of the Court of Appeals will seriously impair the effectiveness of the Board and of the Railway Labor Act. We have pointed out in this connection the enviable record of this Board generally, and the carefully reasoned and judicious nature of its findings and conclusion in this case. We have further

called attention to the whole problem of ineligibility and have pointed out that because of its inherent complications, it is one which falls peculiarly within the ambit of administrative discretion.

We submit, therefore, that the decision of the Court of Appeals is erroneous as a matter of law, and that it constitutes a serious threat to the administrative efficiency of the National Mediation Board, and to the orderly development of the principles of administrative law generally. For these reasons, we ask this court to issue a writ of *certiorari* for its review.

Respectfully submitted,

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